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Supreme Court, U.S.
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No. 88-1192

In The

Supreme Court of the United States

October Term, 1988

ALVIE B. GRAHAM,

Petitioner,

vs.

J. WARREN BETTIS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS J. WARREN BETTIS AND CARL STACEY IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Judge J. Warren Bettis and Clerk of Courts Carl Stacey, believe that the questions Petitioner is attempting to place before this Court are as follows:

1. Whether the Court of Common Pleas for Columbiana County, Ohio, had jurisdiction over a case filed therein so as to entertain a motion for and grant sanctions against a plaintiff for failing to attend his own properly noticed deposition, where the judges of that court had disqualified themselves from hearing the case at the time the noticed deposition was to take place?

2. Whether a state appellate court has jurisdiction where, under state appellate procedure, there must be a final appealable order from which an appeal can be taken and no order was issued by the lower court on a pending motion for relief from judgment?

PARTIES TO THE PROCEEDING IN THE OHIO SUPREME COURT AND THE SEVENTH DISTRICT COURT OF APPEALS OF OHIO

1. Alvie Graham
   Plaintiff-Appellant
2. J. Warren Bettis, Judge of the Columbiana County, Ohio, Court of Common Pleas
   Defendant-Appellee
3. Carl Stacey, Clerk of Courts of the Columbiana County, Ohio, Court of Common Pleas
   Defendant-Appellee
4. Larry Dickey, Esq.
   Defendant-Appellee
5. Eugene Smith, Esq.
   Defendant-Appellee
6. Bertha I. Zahorsky
   Defendant-Appellee

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OPINIONS BELOW

The Ohio Supreme Court overruled Petitioner's motion for an order certifying the record of the Seventh District Court of Appeals of Ohio without opinion on August 3, 1988.

The Seventh District Court of Appeals of Ohio issued an unreported opinion overruling Petitioner's assignments of error and affirming the Common Pleas Court of Columbiana County, Ohio on March 8, 1988.

The Columbiana County, Ohio, Court of Common Pleas issued without opinion a Journal Entry filed November 4, 1984, granting Respondents' motion to dismiss and for sanctions.

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JURISDICTION

Petitioner seeks review of the Opinion of the Seventh District Court of Appeals of Ohio dated March 8, 1988. (The Ohio Supreme Court overruled a motion to certify the record of the Seventh District Court of Appeals of Ohio on August 3, 1988.)

An application for extension of time within which to file a petition for a writ of certiorari was granted and this Court issued an order, dated October 28, 1988, extending the time to file the petition to December 31, 1988.

Petitioner erroneously cites 28 U.S.C. Section 1254 as conferring jurisdiction. The proper jurisdictional statute which Petitioner seeks to invoke is 28 U.S.C. Section 1257 (3). Respondents assert that jurisdiction does not lie in this Court for the reason that Petitioner failed to present federal questions in the state court proceedings below.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner claims to have raised questions involving title, right, immunities or privileges arising under:

1. The Fourteenth Amendment to the Constitution, Section 1, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fourth Amendment to the Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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STATEMENT OF THE CASE

Petitioner is seeking to have this Court review the opinion of the Seventh District Court of Appeals of Ohio. (The Ohio Supreme Court overruled Petitioners' motion to certify the record and declined to exercise its discretionary jurisdiction to review the appellate decision.) The

Seventh District Court of Appeals issued an unreported opinion on two cases which were consolidated for review, both involving the Petitioner herein.

The first case involved was a case captioned *Bertha Graham v. Alvie Graham,* being case number 80-CIV-1000 filed in the Columbiana County, Ohio, Court of Common Pleas. This divorce action was filed in July, 1980, and in it, Respondent Judge Bettis, to whom the case had been assigned, issued a divorce decree on December 17, 1981. Cross-motions to modify the decree were filed. Judge Bettis issued an order of modification of the decree on August 18, 1981. Petitioner Graham filed a motion for relief from judgment under Ohio Rule of Civil Procedure 60(B) in May, 1982. Contemporaneously with that motion, he began filing a series of documents which purported to attack the jurisdiction and venue of the Columbiana County Court of Common Pleas and attempted to disqualify the individual judges of that court. Respondent Bettis subsequently disqualified himself. In May, 1982, Judge Kennedy, to whom the case had been transferred, ruled that since Graham had also filed a motion to disqualify Kennedy from hearing the case, he should not decide any motions pending in that case.

At this same time, Graham filed an action against Respondents Bettis, Stacey and others in a case captioned *Alvie B. Graham v. J. Warren Bettis, Judge, et al.,* being case number 82 CIV 695 in the Columbiana County, Ohio, Court of Common Pleas. The complaint attempted to allege fraud and malfeasance or breaches of statutory duties by Bettis and Stacey, and fraud and legal malpractice against Graham's former attorneys, Respondents

Dickey and Hartford, with respect to the actions of these individuals in the previously filed divorce action.

Respondents timely answered and immediately served upon Alvie Graham a Notice of Deposition to take Graham's deposition. Graham contacted the noticing counsel and requested a continuance, and counsel obliged. A second notice was sent for a later deposition date, and again Graham requested a continuance. A third notice was then sent on August 5, 1982, noticing Graham's deposition for August 30, 1982. On August 25, 1982, Graham filed a "Motion To Vacate Discovery Order" which read like a motion for a protective order. He never advised the noticing counsel of an intent not to appear for the deposition. Consequently, all defense counsel convened for the deposition on the date and at the time and place contained in the third notice. They waited for Petitioner and then recorded with the court reporter present the history of noticing the Petitioner and Petitioner's failure to appear.

On September 26, 1982, Respondents filed with the Court a motion for sanctions pursuant to Ohio Rule of Civil Procedure 37 because of Petitioner's willful refusal to attend his own deposition. Subsequently, a visiting judge was appointed by the Ohio Supreme Court to hear cases 80 CIV 1000 and 82 CIV 695 in the Columbiana County Court of Common Pleas. That judge held a hearing on the Respondents' motion for sanctions which Petitioner attended and then granted the requested sanction of dismissal and also imposed costs sanctions on Petitioner.

On November 30, 1984, Graham filed a Notice of Appeal on both 80 CIV 1000 and 82 CIV 695. The lower court had never ruled on the Rule 60(B) motion in 80 CIV 1000 (the divorce case).

On or about March 8, 1988, the Court of Appeals issued its opinion in the consolidated appeals of 80 CIV 1000 and 82 CIV 695. The Court found that Petitioner had not obtained a final appealable order in 80 CIV 1000 (the divorce case) because the common pleas court had never ruled on the pending rule 60(B) motion. Graham had not timely appealed the original decree or the modification order. Thus, it dismissed the appeal of that divorce case for lack of jurisdiction.

With respect to the other case, number 82 CIV 695, the appellate court found that despite the fact that the judges of the common pleas court had individually disqualified themselves from hearing either case, the common pleas court at all times retained jurisdiction over the case and that the sanctions granted by the assigned visiting judge were proper under the circumstances.

Graham also refers repeatedly to an Ohio case numbered 82-1517. This was an application for a writ of mandamus filed in the Ohio Supreme Court against Bettis and Stacey. On April 20, 1983, the Ohio Supreme Court granted a motion to dismiss the application filed by Bettis and Stacey. Petitioner has not timely sought review by this Court of that action.

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SUMMARY OF ARGUMENT

This Court is without jurisdiction under 28 U.S.C. Section 1257(3) to review this case on a writ of certiorari because Petitioner failed to present the claimed federal questions in the state courts below, and Petitioner failed to present a substantial federal question in his petition. Further, the petition fails to present an important federal question or conflict between courts on a federal issue which would commend review by this Court under Supreme Court Rule 17.1.

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ARGUMENT—REASONS FOR DENYING THE WRIT OF CERTIORARI

I. This Court Has No Jurisdiction To Issue The Requested Writ Of Certiorari

The jurisdiction of the United States Supreme Court to review state court decisions is governed by 28 U.S.C. Section 1257. The jurisdiction granted this court by Section 1257 is based upon the nature of the question presented. Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. Section 1257(3) which provides for certiorari jurisdiction. Petitioner's fundamental misunderstanding of the nature of that Section is exemplified by his attempt to have this court issue the writ to the Ohio Supreme Court. The statute provides for a review by the highest state court in which a decision was or could be reached. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Where, as here, the "highest court" of a state declines to exercise its discretionary jurisdiction,

as the Ohio Supreme Court did in this case by overruling Petitioner's motion to certify the record of the appellate court, then the appellate court becomes the "highest court" for purposes of Section 1257 and the writ is properly directed to that court. *Abood v. Detroit Board of Education, supra; Adams v. Saenger,* 303 U.S. 59 (1938). Thus, Petitioner's petition is defective for failing to seek a writ directed to the proper court.

More important, however, is the fact that this court is without jurisdiction to grant the requested writ. 28 U.S.C. Section 1257(3) allows for review of state court cases in which any title, right, privilege or immunity is "specially set up or claimed" under the Constitution or federal law. This means that the federal question must have been raised for review in the state court proceedings, *Cardinale v. Louisiana,* 394 U.S. 437 (1969), and must be in accord with state practice. *Jones v. Hildebrant,* 432 U.S. 183 (1977). It is telling that Petitioner has failed to follow the requirements of Supreme Court Rule 21.1(h) which require that he disclose the stage of the state court proceedings in which the federal questions sought to be reviewed were raised. Petitioner failed to raise any federal claims at any stage of the state court proceedings. His attempt to now call into question Fourth Amendment (though Respondents are at a loss to understand the applicability of this Amendment to the Petitioner's argument) and Fourteenth Amendment issues is not timely and is insufficient to confer certiorari jurisdiction on this case under Section 1257(3) to review the state appellate court decision. *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934).

Additionally, 28 U.S.C. Section 1257(3) confers upon this court jurisdiction only with respect to *substantial* federal questions. *Zucht v. King,* 260 U.S. 174 (1922). Petitioner has not presented any such substantial federal questions; he has only attempted to cloak his dissatisfaction with state procedural law with federal constitutional verbiage. Because no substantial federal question is presented by Petitioner, this court is without jurisdiction under Section 1257(3) to grant the requested writ.

II. Even Assuming, Arguendo, That This Court Has Jurisdiction For Issuance Of The Requested Writ. The Petitioner Has Failed To Demonstrate Any Important Federal Question Compelling Allowance Of A Writ Of Certiorari

A review of the two underlying state court cases discloses that no questions of federal law are presented at all; these cases involve only the application of state procedural law.

With respect to 80 CIV 1000, the divorce case, the State appellate court found that there was no final appealable order from which Graham could appeal. OHIO REVISED CODE Section 2505.03 states that only judgments or final orders are appealable to an Ohio appellate court. The original divorce decree issued on December 17, 1980, and no Notice Of Appeal was filed thereafter. A modification order was filed on August 18, 1981, and no Notice of Appeal was filed thereafter. A motion to vacate the order was filed, pursuant to Ohio Rule of Civil Procedure 60 (B), on May 19, 1982, but the Columbiana County Court of Common Pleas never rule on the motion up to the date

Graham filed his Notice of Appeal, November 30, 1984, which filing then acted to deprive the common pleas court of jurisdiction to rule on the motion. Consequently, the state appellate court found that it was without jurisdiction over the appeal of that case because either the Notice of Appeal was not timely filed [if directed towards the original decree or the modification order—Ohio law provides that such a notice be filed within 30 days of journalization of the order. Ohio Rule of Appellate Procedure 40(A)] or the trial court had not issued a final appealable order on the pending Rule 60(B) motion so as to confer jurisdiction in the appellate court for review. No important federal issue is presented in that finding to commend review by this Court.

The Ohio Court of Appeals also correctly decided the appeal taken from the case against Respondents Judge Bettis and Clerk of Courts Stacey. The trial court dismissed Graham's complaint on a motion for sanctions under Ohio Rule of Civil Procedure 37(D). Ohio Rule of Civil Procedure 37(D) is virtually identical to Federal Rule of Civil Procedure 37(d). The appellate court found that under Ohio law the trial court retained jurisdiction over the case despite the fact that the judges of that court disqualified themselves and that discovery requested in that proceeding was therefore proper. The visiting judge, appointed by the Ohio Supreme Court to sit in the Columbiana County Court of Common Pleas on these cases, thus had jurisdiction to hear and rule upon the sanctions motion Respondents had filed for Petitioner's refusal to provide discovery.

No important federal question or conflict with other courts' decisions is presented in the State appellate court's

decision. The manner in which the trial court acted was totally consistent and in accord with the longstanding Ohio Rules of Civil Procedure, which parallel the Federal Rules of Civil Procedure on this issue. The discretion of the state court in dismissing the case pursuant to the state rule is fully supported by the evidence in the record.

Assuming, *arguendo,* that Petitioner has timely raised procedural due process issues stemming from the trial court's dismissal of his case against these Respondents pursuant to the Ohio procedural rule, his argument fails. An adequate state appellate procedure for review of the trial court's actions was provided him, and that is all that procedural due process requires in this situation. *Parratt v. Taylor,* 451 U.S. 27 (1981). No important federal question as contemplated by Supreme Court Rule 17.1 compels the issuance of a writ of certiorari for review of this relatively mundane state procedural action.

———o———

CONCLUSION

For all of the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the Seventh District Court of Appeals of Ohio, or the Ohio Supreme Court, as requested by Petitioner.

Respectfully submitted,

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